85-1320

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CENTRAL HARDWARE COMPANY,
Petitioner,

vs.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, EARL L. JENNINGS, JR., HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., and R. V. PULLIAM Sr., as Trustees of the Central States, Southeast and Southwest Areas Pension Fund, and GEORGE W. LEHR, Executive Director of the Central States, Southeast and Southwest Areas Pension Fund,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

KEITH E. MATTERN
LYNN CHIPPERFIELD
Ten Broadway, 14th Floor
St. Louis, Missouri 63102
(314) 231-1100
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

I. WHETHER THE DECISION OF THE COURT OF APPEALS UNDERMINES THE INTEGRITY OF THE COLLECTIVE BARGAINING PROCESS UNDER THE NATIONAL LABOR RELATIONS ACT BY GIVING PENSION FUND TRUSTEES THE AUTHORITY TO REJECT PENSION CONTRIBUTIONS MADE PURSUANT TO COLLECTIVE BARGAINING AGREEMENTS.

II. WHETHER THE DECISION OF THE COURT OF APPEALS ABROGATES CERTAIN PROVISIONS OF THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 BY ENABLING THE PENSION FUND TRUSTEES TO TRIGGER AN EMPLOYER'S WITHDRAWAL FROM THAT PENSION FUND ABSENT AN AFFIRMATIVE ACT ON THE PART OF THE EMPLOYER TO EFFECT SUCH A WITHDRAWAL.

III. WHETHER THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT IN *N.C.A.A. v. BOARD OF REGENTS OF UNIVERSITY OF OKLAHOMA*, 104 S.Ct. 2948 (1984), IN ITS FINDING THAT THE PENSION FUND TRUSTEES' GOOD MOTIVES VALIDATED AN OTHERWISE ANTICOMPETITIVE PRACTICE.

IV. WHETHER THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT IN *JEFFERSON PARISH HOSPITAL DISTRICT NO. 2 v. HYDE*, 104 S.Ct. 1551 (1984) IN ITS MISAPPLICATION OF THE DEFINITION OF SEPARATE PRODUCTS OR SERVICES FOR PURPOSES OF AN ANTITRUST "TYING ARRANGEMENT".

PARTIES TO THE PROCEEDING

The parties to this proceeding are those listed in the caption. Central Hardware Company is a wholly-owned subsidiary of INTERCO INCORPORATED, a Delaware corporation with principal place of business in St. Louis, Missouri. INTERCO INCORPORATED also has several other divisions and subsidiaries in the areas of apparel manufacturing, general retail merchandising, footwear manufacturing and retailing and furniture and home furnishings.[1] None of these other divisions or subsidiaries owns any interest in Central Hardware Company.

The Trustees of the Central States, Southeast and Southwest Areas Pension Fund as listed in the caption were those on October 3, 1983, the date of the commencement of this action. Harold J. Yates and Earl L. Jennings, Jr., are no longer Trustees. They have been replaced by Robert C. Sansone and R. Jerry Cook.

---

[1] As of the date of this filing, the other divisions and subsidiary corporations of INTERCO are as follows: Big Yank Corporation; The Biltwell Company, Inc.; Campus Sportswear Company; Cowden Manufacturing Company; International Hat Company; Londontown Corporation; Abe Schrader Corporation; College-Town; Devon Apparel; Queen Casuals, Inc.; Stuffed Shirt Inc.; Fine's Men's Shops, Incorporated; Golde's Department Stores, Inc.; Idaho Department Stores Co.; Sky City Stores, Inc.; United Shirt Distributors, Inc.; The Florsheim Shoe Company; International Shoe Company; Senack Shoes, Inc.; Broyhill Furniture Industries, Inc.; Ethan Allen Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction of this Court	2
Constitutional Provisions and Statutes	2
Statement of the Case	3
Argument	12
Conclusion	23
Appendix:	
A - Order of the Court of Appeals denying petition for rehearing	A-1
B - Opinion of the Court of Appeals	A-2
C - Opinion of the District Court	A-13

TABLE OF AUTHORITIES

Page

Supreme Court Cases:

National Labor Relations Board v. Amax Coal Co., 453 U.S. 322 (1981) 13

United States v. Carter, 353 U.S. 210 (1957) 14

United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897) 20

N.C.A.A. v. Board of Regents of University of Oklahoma, 104 S.Ct. 2948 (1984) 19, 20

United States v. Griffith, 334 U.S. 100 (1948) 20

Jefferson Parish Hospital District No. 2 v. Hyde, 104 S.Ct. 1551 (1984) 21

Other Cases:

Central States, Southeast and Southwest Areas Pension Fund v. CRST, Inc., 641 F.2d 616 (8th Cir. 1981) . 14

Statutes:

The National Labor Relations Act, 29 U.S.C. §§151 et seq..... 13

The Labor Management Relations Act, 29 U.S.C. §§141 et seq..... 13

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 et seq. 4, 14, 17, 22

The Multiemployer Pension Plan Amendments Act of 1980
29 U.S.C. §§1322a et seq. 5, 14, 17, 18, 19, 22

The Sherman Antitrust Act,
15 U.S.C. §§1 and 2 ..... 19, 20, 21, 23

Other Sources:

House Report 96-869, 96th Congress, 2d Session 1980, reprinted in [4] U.S. Code Congressional and Administrative News, pp. 2918, 2931 15

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CENTRAL HARDWARE COMPANY,
Petitioner,

vs.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, EARL L. JENNINGS, JR., HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., and R. V. PULLIAM Sr., as Trustees of the Central States, Southeast and Southwest Areas Pension Fund, and GEORGE W. LEHR, Executive Director of the Central States, Southeast and Southwest Areas Pension Fund,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The November 8, 1985 Order of a divided United States Court of Appeals for the Eighth Circuit En Banc, denying Central Hardware Company's Petition for Rehearing, is reported at 770 F.2d 106 (8th Cir. 1985), and appears at Appendix A, *infra*. The August 8, 1985 Decision and Order of the three-judge panel of the United States Court of Appeals for the Eighth Circuit is reported at 770 F.2d 106 (8th Cir. 1985), and appears at Appendix B, *infra*. The August 14, 1984 Decision and Order of Judge Roy W. Harper of the United States District Court for the

Eastern District of Missouri, Eastern Division, rendering a decision favorable to Central Hardware Company, is reported at 595 F.Supp. 414 (E.D.Mo. 1984), and appears at Appendix C, *infra*.

JURISDICTION OF THIS COURT

The judgment of the three-judge panel of the United States Court of Appeals for the Eighth Circuit was entered on August 8, 1985. Rehearing was denied by a divided Eighth Circuit Court of Appeals En Banc on November 8, 1985. This Petition for a Writ of Certiorari was filed within ninety (90) days of the latter date. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The National Labor Relations Act,
29 U.S.C. §§151 et seq.

The Labor Management Relations Act,
29 U.S.C. §§141 et seq.

The Employee Retirement Income Security Act of 1974,
29 U.S.C. §§1001 et seq.

The Multiemployer Pension Plan Amendments Act of 1980,
29 U.S.C. §§1322a et seq.

The Sherman Antitrust Act,
15 U.S.C. §1

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deem-

ed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Sherman Antitrust Act,
15 U.S.C. §2

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

1. The Parties

Central Hardware Company ("Central Hardware" or "the Company") is a Missouri corporation engaged in the business of retail sale of home improvement items, with general offices and principal place of business in St. Louis County, Missouri (Stip. Facts-1, App. at 24).

The Central States, Southeast and Southwest Areas Pension Fund ("Central States" or "the Fund") is a trust fund established for the purpose of managing, investing, controlling and disbursing assets pursuant to the terms of the Central States, Southeast and Southwest Areas Pension Plan ("the Plan") (Stip. Facts-2, App. at 24). The Plan and the Fund were formed pursuant to and operate subject to the Employee Retire-

ment Income Security Act of 1974, 29 U.S.C. §§1001 et seq. ("ERISA"), the Internal Revenue Code 26 U.S.C. §§1 et seq., and other applicable federal law, and the Fund maintains its principal place of business in Chicago, Illinois (Stip. Facts-4, App. at 25). At the time of the commencement of this action, defendants Robbins, Winstead, Yates, Jennings, McDougall, Baker, Bunte and Pulliam were Trustees of the Fund, and Defendant Lehr was and is the Executive Director of the Fund (Stip. Facts-8, App. at 25).

The Teamsters Negotiated Pension Fund is a pension fund established pursuant to collective bargaining agreements between various employers and local Teamsters unions (Stip. Facts-9, App. at 26). Teamsters Local Union No. 688 ("Local 688") is a local union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Teamsters") (Stip. Facts-11, App. at 26).

2. The Governing Documents of the Trust

Central States was established pursuant to a Trust Agreement entered into on March 16, 1955, (Stip. Facts-3, App. at 25), and which has been revised and amended as recently as August 15, 1979 (Ex. 4, App. at 59-80). That Trust Agreement was entered into between certain trustees, various employers and Teamsters locals on behalf of and to provide benefits to employee participants and their beneficiaries (Stip. Facts-3, App. at 25).

The Fund is maintained pursuant to collective bargaining agreements negotiated between participating employers and local Teamsters unions (TR. 60, Trojak). Central Hardware is an "employer", Local 688 is a "union" and the Trustees are "Trustees" as set forth in the recital of the Trust Agreement, (Stip. Facts-5, App. at 25), and this Agreement therefore represents a contract between the Trustees on one hand and Central Hardware and Local 688 on the other hand. 595 F.Supp., at 420.

The Plan (Ex. 22, App. at 124-149) is a formal document prepared by the Trustees pursuant to Article VII of the Trust Agreement (Stip. Facts-6, App. at 25). The Plan gives the Trustees no greater powers than those they are granted in the Trust Agreement and by applicable federal law (TR. 88, Trojak).

3. 1979 Negotiations Between Central Hardware and Local 688

Since at least 1959, Central Hardware has entered into collective bargaining agreements with Local 688 (Stip. Facts-14, App. at 26). Prior to May 1979, those agreements called for the making of contributions by Central Hardware to Central States for all the members of the Local 688 bargaining unit at a uniform rate after thirty days of employment (Stip. Facts-15, App. at 26-27).

At the commencement of the negotiations on the 1979-1982 Collective Bargaining Agreement, (Ex. 12, App. at 86-92), Central Hardware demanded that the Company be allowed to discontinue its contributions to Central States (TR. 8, Collins). Central Hardware was concerned about the "staying power" of Central States, (TR. 40, Cohen), and the "troubled nature" of the Fund, (TR. 9, Collins), and was exploring ways of terminating its participation in the Fund while protecting the benefits of its employees (TR. 41, Cohen).

As an alternative, the Company proposed that all of the employees in the bargaining unit be put into a company-sponsored plan through General American Life (TR. 8, Collins). The company's goal was *not* to decrease benefit levels to its employees, but rather to decrease contribution levels and to provide its employees with a comparable, but more stable, pension plan (TR. 9, Collins; TR. 41, Cohen). This suggestion that all employees be withdrawn from Central States pre-dated the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§1322a et seq., ("MPPAA"), which took effect in September 1980 and which amended ERISA.

After extensive bargaining, Central Hardware and Local 688 agreed that Central Hardware would continue to make payments to Central States for all of the employees in the bargaining unit for the term of the Agreement (TR. 10, Collins). The Agreement was to expire in May 1982 (Ex. 12, App. at 86-92).

4. 1980 Negotiations Between Central Hardware and Local 688

In the summer of 1980, Central Hardware had outgrown its existing facility, and had the option of either expanding its St. Louis County warehouse facility, or moving its warehouse operations to a larger facility out of the St. Louis area (TR. 42, Cohen). The transfer of warehouse operations from St. Louis would have entailed the loss of most, if not all, of the jobs held by members of the Local 688 warehouse bargaining unit (TR. 42, Cohen). The representatives of Local 688 were aware that Central Hardware was considering this move (TR. 153, Diffley).

In contemplation of Central Hardware's move, and in order to preserve the jobs of its members, Local 688 agreed to enter into a "mid-term" Memorandum of Understanding to alter some of the provisions of the 1979-1982 Collective Bargaining Agreement (TR. 154, Diffley). That Memorandum of Understanding contained, among other concessions, two specific provisions regarding pension contributions. On page 1 it provided:

> "2. **Article XXXII - Pension:** It is agreed that for the life of this agreement the Company shall neither maintain nor contribute to the Central States, Southeast and Southwest Area [sic] Pension Fund for any employee hired after January 1, 1981."

On page 3 it provided:

> "10. Lastly, in connection with the Company's continuing objection to payment into the Central States, Southeast and Southwest Area [sic] Pension Fund, the Union and

> Company agree that the parties shall discuss in good faith the Company being permitted to transfer all and/or any portion of its bargaining unit into what is referred to as the Teamster Negotiated Occidental Pension Plan. Such discussions shall occur in connection with the parties' collective bargaining agreement for the period of 1982 through 1985." (TR. 11-12, Collins).

In consideration of these concessions made by Local 688, Central Hardware stayed in St. Louis, expanded its existing facility by 186,000 square feet and added additional warehouse employees (TR. 42, Cohen).

This Agreement also pre-dated the MPPAA amendments to ERISA.

5. 1982 Negotiations Between Central Hardware and Local 688

At the commencement of the negotiations on the 1982-1985 Collective Bargaining Agreement, (Ex. 13, App. at 94-99) Central Hardware demanded that the provisions regarding pension contributions be changed to read as follows:

> "All employees hired after May 17, 1982 shall be covered under either the Teamsters Occidental Plan or a company-sponsored pension plan" (TR. 13-14, Collins).

The Teamsters Occidental Plan referred to in this paragraph is the same as the Teamsters Negotiated Pension Fund.

The Company's position on pension benefits had changed between 1979 (demanding removal of *all* employees from Central States) and 1982 (demanding exclusion only of *newly hired* employees from Central States). This change was prompted by MPPAA, which would have imposed a substantial withdrawal liability upon Central Hardware upon a withdrawal of all of its warehouse employees from Central States (TR. 43, Cohen; TR. 15, Collins). A gradual withdrawal from Central States, as contemplated by the 1982 proposal, would not trigger the liability

provisions of MPPAA, (TR. 15, Collins), and would be consistent with the purpose of MPPAA to fund liabilities referable to participating employees.

Under the Company's proposal, the level of benefits to employees participating in each plan would be substantially the same (TR. 15, Collins; TR. 44, Cohen). However, a *$20.00* weekly contribution to the Teamsters Negotiated Pension Fund would secure for employees the same level of benefits as a *$46.00* weekly contribution to Central States (Ex. 13, App. at 97-98).

The Union's position at the commencement of the 1982 negotiations called for a continuation of participation of *all* warehouse employees in Central States (TR. 16, Collins). Throughout the negotiations, Central Hardware maintained its position with respect to pension benefits, (TR. 45, Cohen), telling the Local 688 representatives that the new pension provision was "a must" and that "we had to have this if we were going to have a contract" (TR. 27, Collins). The Union also maintained its position (TR. 155, Diffley), but the Union negotiators knew that the Company considered this a "strike issue" (TR. 156, Diffley). Negotiations on this pension issue continued until hours before contract termination.

6. The Memorandum of Understanding

At the end of the negotiations, (TR. 17, Collins; TR. 149, Diffley), the Union conceded on the pension issue and agreed to contributions to the Teamsters Negotiated Pension Fund on behalf of all newly hired employees (Ex. 13, App. at 98; TR. 149, Diffley). The Union negotiators requested, however, (TR. 157, Diffley), that a Memorandum of Understanding be executed to provide for the possibility that the Collective Bargaining Agreement violated "the terms and provisions of the Central States Pension Plan in existence and effect on May 19, 1982 ..." (Ex. 28, 29, App. at 161-164). The Memorandum of

Understanding provided that upon "a final determination of such a violation" payments for newly hired employees would be made to Central States rather than to the Teamsters Negotiated Pension Plan (*Id*). The "final determination" referred to in that sentence contemplates a judicial determination (Stip. Facts-29, App. at 30).

This Memorandum of Understanding was drafted to be certain that the Trustees could not unilaterally reject the contract, and that any decision on the contract terms would be subject to "final adjudication" by a court. (TR. 32, Collins).

Before execution of the Memorandum of Understanding, Central Hardware's representatives had completed a review of the Central States Pension Plan as prepared and published by Central States (Ex. 22, App. at 124-149) and had satisfied themselves that there were no provisions within the Plan that precluded the company from having new employees moved into another pension plan, and that the Collective Bargaining Agreement did not violate the "terms and provisions" of the Plan (TR. 18, Collins). Union representatives were not aware of any "terms and provisions" of the Plan that the Agreement might violate (TR. 150, Diffley). The concern of the Union was merely to be certain that the benefits due its members would be protected (TR. 154, Diffley). Neither the Company nor the Union had ever had a collective bargaining agreement rejected by Central States in the past (TR. 47, Cohen; Tr. 173, Akers).

7. Special Bulletin No. 20 — The Resolution

On August 17, 1977 the Trustees had adopted a resolution to "prohibit acceptance of Collective Bargaining Agreements considered detrimental to the actuarial soundness of the Pension Fund" (Ex. 5, App. at 81-83). In October 1977, copies of this Resolution (designated Special Bulletin No. 20) were sent to all *unions* participating in the Plan, including Local 688 (Stip. Facts-18, App. at 27; TR. 69, Trojak). Copies of this Resolu-

tion were *not* sent to any contributing *employers,* including Central Hardware (Stip. Facts-18, App. at 27). Neither Central Hardware nor its bargaining representatives were aware of the existence of this Resolution during contract negotiations (TR. 20, Collins; TR. 46, Cohen).

Bargaining representatives of Local 688 were aware of the existence and terms of the Resolution during bargaining on the 1982-1985 contract (TR. 174, Akers). The Local 688 representatives did not raise the issue during negotiations because they did not believe it applicable to the Company's position on the pension issue (TR. 173, Akers).

After the Collective Bargaining Agreement was executed by representatives of Central Hardware and of Local 688, a copy of the Agreement was sent to the Fund by Union representatives. By a letter of October 26, 1982 (Ex. 23, App. at 150) the Operations Director of the Fund advised Local 688 that the provisions of the Collective Bargaining Agreement were "contrary to the rules and regulations established by the Trustees" and that the provision regarding pensions was "unacceptable for continued participation" (Ex. 23, App. at 150). The letter concluded:

> "The Trustees have directed the involved parties be advised that an acceptable contract must be provided or the bargaining unit cannot continue to participate in the Fund." (*Id.*)

On November 30, 1982, in response to a request by Central Hardware, the Director of Plan Development for the Fund sent Central Hardware a copy of Special Bulletin No. 20 (Ex. 25, App. at 153). It was upon the basis of this Resolution that the Trustees rejected the 1982-1985 Collective Bargaining Agreement (*Id.*) This was the first notice to Central Hardware of the existence and terms of the August 17, 1977 Resolution (TR. 46, Cohen).

Central States is a "multi-employer plan" as contemplated by MPPAA (Stip. Facts-21, App. at 27). Central Hardware has been given the option either of including all of its warehouse employees in the Fund or of having its participation in the Fund terminated involuntarily (TR. 140, Bleakney; Stip. Facts-28, App. at 29). The Fund's termination of the bargaining unit's right to participate in the Fund would precipitate a withdrawal from the Fund on the part of Central Hardware as contemplated by MPPAA (Stip. Facts-22, App. at 27-28). As of March 7, 1984, the Fund alleged Central Hardware's withdrawal liability in the event of such a withdrawal to be approximately $727,828.89 (Stip. Facts-23, App. at 28; Ex. 35, App. at 222).

On October 3, 1983, Central Hardware filed suit against Central States, its Executive Director and its Trustees in the United States District Court for the Eastern District of Missouri, Eastern Division, seeking a declaratory judgment and injunctive relief. The jurisdiction of the District Court was invoked pursuant to 29 U.S.C. §1132(e), 15 U.S.C. §§15(a) and 26, and 28 U.S.C. §§1331 and 1337(a). The District Court held in favor of Central Hardware, finding that the Trustees' rejection of the Collective Bargaining Agreement constituted a breach of the Trustees' contract with Central Hardware. The United States Court of Appeals for the Eighth Circuit reversed the District Court, finding that the Trust Agreement gave the Trustees the authority to reject Central Hardware's contributions. Central Hardware's Petition for Rehearing was denied by a divided Eighth Circuit Court of Appeals En Banc.

ARGUMENT

To the Honorable Justices of the Supreme Court of the United States:

Central Hardware respectfully petitions this Court to grant a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Eighth Circuit dated August 8, 1985, a Petition for Rehearing of which Decision was denied by a divided Eighth Circuit Court of Appeals En Banc on November 8, 1985. Central Hardware respectfully petitions for a review of that part of the Decision holding that the Trust Agreement pursuant to which the Fund was established and presently operates, gives the Trustees of the Fund the authority to reject payments from participating employers made pursuant to a validly negotiated collective bargaining agreement and that part of the Decision holding that the actions of the Trustees do not constitute violations of Sections 1 and 2 of the Sherman Antitrust Act.

Central Hardware respectfully requests that this Writ of Certiorari issue because the attention of this Court should be directed to important questions of federal law and to the issues of exceptional public importance which have not been, but which should be, settled by this Court. Central Hardware further respectfully requests that this Writ of Certiorari issue because the Decision of the Eighth Circuit Court of Appeals directly conflicts with prior Supreme Court precedent.

In support of this Petition, Central Hardware submits the following:

I. The Decision Of The Court Of Appeals Undermines The Integrity Of The Collective Bargaining Process Under The National Labor Relations Act By Giving Pension Fund Trustees The Authority To Reject Pension Contributions Made Pursuant To Collective Bargaining Agreements.

The Eighth Circuit Court of Appeals held that the Trustees were given the authority in the trust's governing documents to reject payments by participating employers that operate to threaten the actuarial soundness of the Fund. The panel was careful to point out that "our holding is in no way meant to imply that CS [Central States] has the authority to alter, reject, or rewrite the terms of the collective bargaining agreement between CH [Central Hardware] and the Union." 770 F.2d, at 111.

Nevertheless, the Court's allowing the Trustees to reject contributions made by Central Hardware acts as a de facto alteration, rejection or revision of the collective bargaining agreement. The provision in the agreement obligating Central Hardware to make contributions to Central States only on behalf of employees hired before May 19, 1982 is effectively negated by the actions of the Trustees and by the Decision of the Eighth Circuit ratifying those actions. The Court's distinction notwithstanding, the May 19, 1982 collective bargaining agreement has been altered without the agreement or consent, and against the express wishes, of Central Hardware and Local 688.

The recognition of the right of employers and unions to bargain collectively is axiomatic. (See generally, The National Labor Relations Act, 29 U.S.C. §§151 et seq. and The Labor Management Relations Act, 29 U.S.C. §§141 et seq.)

In *National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322 (1981), this Court recognized that the parties to the collective bargaining process are free to negotiate the terms and conditions of pension contributions, and that fund trustees have no control over the employer's obligation to make contributions, or over the amount of those contributions. *Id.*, at 336-37. This Court stated:

> "The management-appointed and union-appointed trustees do not bargain with each other to set the terms of the employer-employee contract; they can neither require employer contributions not required by the original collectively bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions. . . . Indeed, the trustees have an obligation to *enforce* the terms of the collective bargaining agreement regarding employee fund contributions against the employer 'for the sole benefit of the beneficiaries of the fund'." *Id.* citing *United States v. Carter,* 353 U.S. 210, 220 (1957) (emphasis in original).

Thus, this Court has held that the collective bargaining process is of paramount importance and must be protected at all costs from interference by pension fund trustees.

Previously to the instant case, the Eighth Circuit had taken a similar position. In a case involving the very same pension fund at issue in the instant case, and the very same trust documents analyzed by the Court in the instant case, the Eighth Circuit held that "[t]he Funds owe their existence to the collective bargaining agreements", and that "employee coverage is to be determined solely under the provisions of the collective bargaining agreements." *Central States, Southeast and Southwest Areas Pension Fund v. CRST,* 641 F.2d 616, 617, 619 (8th Cir. 1981).

Thus, the Eighth Circuit had held previously that the Trustees of the Central States fund are bound by the provisions of the applicable collective bargaining agreements. The Eighth Circuit has, in the instant case, rendered a decision inconsistent with that previous holding.

ERISA, and its amendment by MPPAA, did not compromise in any way the integrity of the collective bargaining process. Indeed, the legislative history of MPPAA notes that:

> "Multiemployer plans are creatures of collective bargaining. The committee believes that the integrity of the collective bargaining process must be preserved to the utmost extent consistent with assuring the financial soundness of multiemployer plans to meet benefit committments. The bill as reported out by the committee represents an effort to strike an appropriate balance among conflicting interests and needs." House Report 96-869, 96th Congress 2d Sess. 1980, reprinted in [4]1980 U.S. Code Cong. & Admin. News, pp. 2918, 2931

The Eighth Circuit Decision does great violence to the delicate balance established by Congress between the integrity of the collective bargaining process and the soundness of multiemployer plans. Employers and unions can no longer collectively bargain for the creation of a trust fund in which the trustees are charged with a duty to "receive" contributions, (as was done in the instant case) since the Trustees are now given the power to absolve themselves from that duty by the exercise of their powers to "administer" the trust fund. Employers and unions are now precluded from freely and fairly negotiating levels of pension contributions, since all such contributions are subject to rejection by the Trustees.

As threatening as the Eighth Circuit's Decision is to the power of employers and unions to bargain collectively contribution levels, however, it is even more dangerous when considered for its precedential value. By this Decision, the Trustees of a pension fund are given the broad authority to reject contributions if they deem the acceptance of such contributions to be detrimental to the actuarial soundness of the fund. The following hypothetical factual situations are reasonable extensions of the doctrine advanced by the Eighth Circuit Court of Appeals:

1. An employer and a union collectively bargain, as part of an affirmative action program, that only employees over age 45 will be hired during the term of the agreement. The fund trustees reject the

employer's contributions because to accept only such older employees, without a counterbalance of younger employees, would be detrimental to the actuarial soundness of the fund.

2. An employer and a union collectively bargain that only handicapped employees will be hired during the term of the agreement. The trustees reject the employer's contributions because they deem handicapped individuals to have a shorter expected work life and that their acceptance into the fund would be detrimental to its actuarial soundness.

3. An employer and a union collectively bargain an across-the-board hiring freeze for the term of the agreement. The fund trustees reject the employer's contributions because the absence of new, young employees to replace the older retiring employees would be detrimental to the actuarial soundness of the fund.

The examples set forth above are not wholly speculative. The record in this case reflects that the Central States Trustees have undertaken the authority to reject any collective bargaining agreement because the term of the agreement is too long, the term is too short, the right wording is not used, the contribution rate is not acceptable, or for any number of other nebulous reasons (TR. at 96-99). Given the express approval of the Eighth Circuit Court of Appeals to reject contributions made pursuant to a collective bargaining agreement, the Trustees' interference with the collective bargaining process can only be expected to continue and expand.

The great damage done to the parties and to the collective bargaining process is clear. Collective bargaining represents a delicate balancing of the interests of labor and management. On the compensation issues, a finite amount of money is generally offered, with the parties negotiating to determine what portion

of that money will be paid as immediate salary and what portion will be paid in the form of contributions to the pension fund. In the case at bar, the negotiations on the pension issues continued up until the final hours before contract termination (TR. at 17).

The Court's decision in this case has denied Central Hardware the benefits of its bargaining. Central Hardware is now faced with a choice of higher pension payments (the Central States fund is more than *twice* as expensive as the fund bargained for, see Appendix at 97-98) or a prohibitive MPPAA withdrawal liability. These are costs not bargained for and are not offset by the sort of salary concessions which would be negotiated with the union in the collective bargaining process. By this decision, the entire collective bargaining process has been compromised.

II. The Decision Of The Court Of Appeals Abrogates Certain Provisions Of The Multiemployer Pension Plan Amendments Act Of 1980 By Enabling The Pension Fund Trustees To Trigger An Employer's Withdrawal From That Pension Fund Absent An Affirmative Act On The Part Of The Employer To Effect Such A Withdrawal.

By enacting MPPAA, Congress sought to alleviate some of the hardships imposed by provisions of ERISA that limited the flexibility of plan administrators in addressing fund shortages. Among its provisions, MPPAA for the first time provided for employer obligations in the event of a withdrawal, either partial or complete, of that employer or of a bargaining unit from a multiemployer plan. A withdrawing employer is liable for its pro rata share of the unfunded vested liabilities of the fund.

Congress structured MPPAA in such a way that a gradual withdrawal from a multiemployer plan, phased in over several years such that there was never a 70% contribution decline at any one time, would not trigger MPPAA withdrawal liability. Section 104(2)(a) of MPPAA (29 U.S.C. §1385(a)) provides that:

". . . there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year —

(1) there is a 70-percent contribution decline, or

(2) there is a partial cessation of the employer's contribution obligation."

There is no allegation in the instant case that the Central Hardware negotiated contribution arrangement would trigger either of these provisions, and, in fact, it would not.

Nevertheless, the Eighth Circuit Court of Appeals has ratified the Trustees' rejection of contributions made by Central Hardware pursuant to the Collective Bargaining Agreement. Central Hardware must now either amend its Collective Bargaining Agreement to include all of its present and future employees in the Fund, or face an involuntary termination of its participation in the Fund. The latter will necessarily precipitate a withdrawal of the Central Hardware bargaining unit from the Fund, with the attendant withdrawal liability which the record has shown to be approximately $727,828.89 (App. at 28).

The withdrawal liability provisions of MPPAA are essentially punitive. They were designed to hold withdrawing employers accountable for funding deficiencies resulting from employer withdrawals from multiemployer plans. An act taken by an employer or a union which resulted in such a withdrawal, either complete or partial, would trigger the liability provisions of the statute. The essential point here is that an act of the *employer* or the *union* (and not that of a third party) is required to precipitate such a withdrawal.

By its decision in the instant case, one of the Courts of Appeals has, for the first time, recognized the right of a third party, the trustees of a multiemployer plan, to precipitate an employer's withdrawal and to thereby trigger the punitive provisions of MPPAA. Even without an affirmative act on the part of the employer or the union, without the consent of the

employer or the union, and against the express wishes of both, the Trustees have been given the power to reject contributions made by employers and to thereby trigger the statutory penalties.

By its Decision in the instant case the Eighth Circuit has totally abrogated the finely balanced Congressional allocation of pension liabilities represented by MPPAA. Central Hardware has been denied the right to avail itself of a negotiated gradual withdrawal program which would not, in itself, trigger the MPPAA penalties. Instead the Trustees have been granted the power to trigger such penalties without an affirmative act on the part of Central Hardware which would have constituted a withdrawal. The provisions of the statute have been vitiated and Central Hardware has involuntarily been exposed to substantial financial liabilities (either in the form of increased pension contributions or a MPPAA withdrawal liability payment), for its attempts to avail itself of the protections of this remedial federal statute.

III. The Decision Of The Court Of Appeals Is In Conflict With The Decision Of The Supreme Court In *N.C.A.A. v. Board Of Regents Of University Of Oklahoma*, 104 S.Ct. 2948 (1984), In Its Finding That The Pension Fund Trustees' Good Motives Validated An Otherwise Anticompetitive Practice.

Central Hardware has charged that Central States violated Section 2 of the Sherman Antitrust Act (15 U.S.C. §2) by attempting to monopolize pension contributions from the Fund's contributing employers. In its analysis of this issue, the District Court applied a "good faith" test, holding that as long as the Trustees were acting "to protect their interest", they could not be found to have a specific intent to monopolize. 595 F.Supp., at 421. The Court of Appeals affirmed the District Court on this issue without discussion.

The Decision of the District Court, as affirmed by the Court of Appeals, is contrary to Supreme Court precedent. In a line of cases dating back as far as 1897, this Court has uniformly held that, if the effect and purpose of a series of acts is to restrain or monopolize interstate commerce, the motive which inspires it, whether good or bad, is irrelevant. See, e.g., *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 342 (1897).

The most recent affirmation of this rule is contained in *N.C.A.A. v. Board of Regents of University of Oklahoma,* 104 S.Ct. 2948 (1984), in which this Court stated that "it is . . . well-settled that good motives will not validate an otherwise anticompetitive practice.", *Id.*, at 2960, n. 23. Accordingly, the motives, good or bad, of the Trustees are irrelevant in this case. As stated by Justice Douglas in *United States v. Griffith,* 334 U.S. 100 (1948), the court rather must focus on the *anticompetitive effects* of the acts:

> "...even if we accept the District Court's findings that appellees had no intent or purpose unreasonably to restrain trade or to monopolize, we are left with the question whether a *necessary and direct result* of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act." *Id.*, at 106. (Emphasis supplied)

The record in this case clearly reflects that, not only is it its "necessary and direct result", but it is the *express purpose* of the Trustees' actions to eliminate competition. The finding of the District Court, as affirmed by the Court of Appeals, that the Trustees acted in good faith represented a mis-application of the law, and mandates a reversal of the decision on that issue.

IV. The Decision Of The Court Of Appeals Is In Conflict With The Decision Of The Supreme Court In *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S.Ct. 1551 (1984) In Its Misapplication Of The Definition Of Separate Products Or Services For Purposes Of An Antitrust "Tying Arrangement".

Central Hardware has also charged that Central States violated Section 1 of the Sherman Antitrust Act (15 U.S.C. §1) by attempting to tie together the purchase of pension benefits for present employees with the purchase of pension benefits for future employees. The District Court found that "the arrangement proposed here does not link two distinct markets for products which are distinguishable in the eyes of consumers." 595 F.Supp., at 422. The Court of Appeals affirmed the District Court on that issue without discussion.

The Decision of the District Court, as affirmed by the Court of Appeals, is contrary to Supreme Court precedent. The most recent discussion by this Court of the standards to be applied in a "tying" case is found in *Jefferson Parish Hospital District No. 2 v. Hyde,* 104 S.Ct. 1551 (1984). In that case, this Court held:

> "...the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items" *Id.*, at 1562.

This Court held that a tying arrangement existed in *Jefferson Parish Hospital* because there was "a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services." *Id.*, at 1563.

The threshold question in the instant case therefore becomes whether there is a sufficient demand for pension benefits for

"non-employees" (those individuals *not* already participating in a pension fund) separate from that for "employees" (those individuals already so participating) such as to identify a distinct product market in which it is efficient to offer pension coverage for "non-employees" separate from "employees".

Because of ERISA and MPPAA, once an employer commences contributions to a multiemployer pension fund on behalf of its employees, those employees are effectively "locked into" that pension fund. The employer cannot exercise its prerogatives in the free market system by "taking its business elsewhere" because it would face substantial withdrawal liability under MPPAA in doing so. Thus if there is to be any free market competition at all among private pension funds, it can only be with reference to the contributions for those employees who are *not* so presently participating. To hold otherwise would be effectively to preclude *any* competition among private pension funds, and to mandate that once an employer commences contributions to a pension fund, it must remain in that fund forever, for all of its present and future employees.

That there exists a demand in the market place for the provision of pension benefits to these "non-employees" is clearly demonstrated in the instant case. It is uncontroverted that the Teamsters Negotiated Pension Plan has offered to provide pension benefits for these "non-employees" as provided in the 1982 Collective Bargaining Agreement. (TR. 164-165). Indeed, Central States has conceded that these "non-employees" would be an attractive target for other pension funds. (Appellant's Brief at 9-10). The number of private pension funds in the market today, and the apparent desperation with which Central States seeks to hold onto these "non-employees" would clearly reflect a demand in the market place for the provision of these benefits.

CONCLUSION

For the foregoing reasons, Central Hardware respectfully Petitions this Court to grant a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Eighth Circuit. Pursuant to that review, Central Hardware asks this Court to affirm the Order of the District Court on Count I of its Complaint, finding that the rejection by the Trustees of Central Hardware's Collective Bargaining Agreement constitutes a breach of the Trustee's contractual obligations to Central Hardware. Central Hardware further asks this Court to vacate the Order of the District Court and to order the District Court to enter judgement in favor of Central Hardware and against Central States on Count III of Central Hardware's Complaint, and to find that Central States has engaged in an attempt to monopolize in violation of Section 2 of the Sherman Antitrust Act, and in an illegal tying arrangement in violation of Section 1 of the Sherman Act.

Respectfully submitted,

CENTRAL HARDWARE
COMPANY
Keith E. Mattern
Lynn Chipperfield
Ten Broadway, 14th Floor
St. Louis, Missouri 63102
(314) 231-1100

Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-2158/2297-EM

Central Hardware Company, etc.,
Appellee/Cross Appellant,

vs.

Central States, et al.,
Appellants/Cross Appellees.

Appeals from the United States District Court
for the Eastern District of Missouri

Petition for rehearing en banc filed by Central Hardware Company, has been considered by the Court and is denied.

Judges Donald R. Ross and Pasco M. Bowman would have granted the petition.

Petition for rehearing by the panel is also denied.

November 8, 1985

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2158

Central Hardware Company, a corporation,
Appellee,

vs.

Central States, Southeast and Southwest Areas Pension Fund, and Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Earl L. Jennings Jr., Howard McDougall, Robert J. Baker, Arthur H. Bunte Jr., and R. V. Pulliam Sr., as Trustees of the Central States, Southeast and Southwest Areas Pension Fund, and George W. Lehr, Executive Director of the Central States, Southeast and Southwest Areas Pension Fund,
Appellants.

No. 84-2297

Central Hardware Company, a corporation,
Appellant,

vs.

Central States, Southeast and Southwest Areas Pension Fund, and Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Earl L. Jennings Jr., Howard McDougall, Robert J. Baker, Arthur H. Bunte Jr., and R. V. Pulliam Sr., as Trustees of the Central States, Southeast and Southwest Areas Pension Fund, and George W. Lehr, Executive Director of the Central States, Southeast and Southwest Areas Pension Fund,
Appellees.

Appeal and Cross Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: April 8, 1985
Filed: August 8, 1985

Before BRIGHT, ARNOLD, and FAGG, Circuit Judges.

FAGG, Circuit Judge.

Central Hardware Company (CH) brought suit against Central States, Southeast and Southwest Areas Pension Fund (CS) and its trustees and executive director for refusing to accept payments tendered by CH. CH claims CS' actions amount to: (1) a breach of the trust agreement between the parties, (2) intentional interference with CH's collective bargaining agreement with St. Louis Teamsters Local Union No. 688 (Union), and (3) a violation of federal antitrust laws.

The district court agreed that CS' refusal to accept the payments tendered by CH amounts to a breach of the parties' trust agreement and thus enjoined CS from refusing to accept payments in the future. The court rejected CH's claims for tortious interference with its collective bargaining agreement and violations of the antitrust laws. Both parties have appealed from the rulings of the district court that operate in their disfavor. 595 F. Supp. 414 (E.D. Mo. 1984).

We reverse the district court's ruling on CH's breach of the trust agreement claim and affirm the district court's rejection of CH's tortious interference and antitrust claims.

Facts

CS is a large, multi-employer pension fund governed by section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, as

amended by the Multi-Employer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1322a *et seq.* CS operates as a trust, providing pension and other benefits to employees covered under collective bargaining agreements negotiated by various affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

CH, a St. Louis based corporation, engages in collective bargaining with Local Union 688. In compliance with its collective bargaining agreement with the Union, CH makes payments to CS for the purpose of providing benefits to its employees.

CH has been a participating employer in CS since 1959. At the commencement of negotiations for its 1979-82 collective bargaining agreement with the Union, CH demanded the termination of payments to CS and proposed, instead, to make payments for the benefit of those represented by the Union into an alternative pension plan. The Union rejected CH's demand and CH continued to make payments to CS.

Within a year CH reopened negotiations with the Union and again discussed termination of payments to CS. CH and the Union entered into a mid-term memorandum of understanding in which the Union agreed to discuss in the 1982-85 collective bargaining negotiations the making of payments by CH for all or any portion of its bargaining unit into the Teamsters Negotiated Occidental Pension Plan (TNOPP) rather than to CS.

Following execution of the memorandum of understanding, Congress enacted the Multi-Employer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1322a *et seq.* Under the MPPAA, Congress imposed liability for unfunded vested benefits on employers that withdraw from a multi-employer pension plan. Consequently, in the 1982 collective bargaining negotiations CH did not seek a total termination of payments to CS. Rather, believing it would avoid MPPAA withdrawal

liability, CH agreed to continue making payments to CS on behalf of all but the newly hired Union employees. For those hired after May 19, 1982, CH demanded that it make payments to the TNOPP.

The Union yielded to CH's demands and agreed that payments by CH on behalf of all newly hired employees be made to the TNOPP rather than to CS. The Union did, however, demand the execution of a memorandum of understanding providing for the possibility of the new collective bargaining agreement violating the terms and provisions of "the Central States Pension Plan in existence and effect on May 19, 1982." The memorandum provided that in the event of a judicial determination that the new agreement violates the terms of CS' plan, CH agrees that contributions for newly hired employees will be made to CS rather than to the TNOPP.

This controversy results from CS' response to the 1982 collective bargaining agreement between CH and the Union. After reviewing the 1982 agreement, CS concluded that the absence of payments by CH on behalf of employees hired after May 19, 1982, would operate to threaten CS' actuarial soundness. By resolution of its Board of Trustees, CS thus informed CH and the Union that unless CH made payments to CS on behalf of both old and new hirees, it would terminate the bargaining unit's participation in the trust fund. CH declined to alter its agreement with the Union and CS in turn refused acceptance of payments tendered by CH for employees hired prior to the May 19, 1982 cut-off date.

Breach of Trust Agreement

The documents governing the contractual relationship between CS and CH include the CS trust agreement and the resulting CS pension plan, along with the collective bargaining agreement and participation agreement signed by CH and the Union. CH contends that CS is obligated under various provi-

sions of these governing documents to accept the payments tendered by CH on behalf of employees hired prior to May 19, 1982. CS points to other provisions in the relevant documents to support its authority to refuse acceptance of the tendered payments. The parties do not dispute that both the powers and obligations of the trustees are to a large degree determined by the provisions of the trust documents. *See Sinai Hospital of Baltimore, Inc. v. National Benefit Fund for Hospital & Health Care Employees,* 697 F.2d 562, 567 (4th Cir. 1982). Rather, their dispute is over the legal construction to be applied to various document provisions.

The district court agreed with CH, concluding not only that there is no authority in the documents for CS' refusal to accept CH's tendered payments but that the trust agreement requires CS to accept the payments tendered by CH under its collective bargaining agreement with the Union. The district court thus enjoined CS from refusing to accept the payments tendered by CH for the benefit of employees hired prior to May 19, 1982.

A. Standard of Review

Initially, we must decide whether the pertinent documents governing the contractual relationship between CS and CH provide the trustees with authority to reject the payments tendered by CH. A construction of the trustees' authority under the terms of these documents "raise[s] issues of law and [is] freely reviewable." *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.,* 698 F.2d 802, 805 (6th Cir. 1983), *rev'd on other grounds,* 53 U.S.L.W. 4811 (U.S. June 19, 1985); *see International Union, United Automobile Workers of America v. General Electric Co.,* 714 F.2d 830, 832 (8th Cir. 1983); *Western Contracting Corp. v. Dow Chemical Co.,* 664 F.2d 1097, 1100 (8th Cir. 1981). Once it is determined that the trustees have the authority to reject payments under the terms of the relevant documents, our review of the propriety of their actions in rejecting the payments is limited to a determina-

tion of whether the trustees' decision is arbitrary, capricious, or an abuse of discretion. *Tormino v. United Food and Commercial Workers International Union, Industry Pension Fund,* 712 F.2d 882, 883 (8th Cir. 1983); *Quinn v. Burlington Northern, Inc. Pension Plan,* 664 F.2d 675, 678 (8th Cir. 1981), *cert. denied,* 456 U.S. 928 (1982).

B. Provisions of the Governing Documents

CH supports its argument that CS is obligated to accept the payments tendered by initially pointing to its obligation under Article III, section 1 of the trust agreement to "make continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement between the parties." Section 7.01 of the pension plan provides essentially the same thing. CH notes that its 1982 collective bargaining agreement with the Union obligates it to make payments only for the benefit of those employees hired prior to May 19, 1982. CH then points to Article III, section 3 of the trust agreement in which the trustees "agree to receive all such payments, deposits, moneys, insurance and annuity contracts" made by the employers to CS. CH also relies on Article IV, section 2 of the trust agreement which obligates the trustees to collect the income from and contributions to the trust fund. CH argues that these provisions obligate CS to receive the payments tendered by CH, and further that no other provisions of the relevant documents give CS the authority to reject the tendered payments.

If the sections CH is relying on were the only provisions in the trust agreement relevant to the powers and duties of the trustees, we might be inclined to agree with CH. Our review of the documents, however, reveals a number of provisions highly supportive of the trustees' authority to refuse the tender of payments made by CH.

Article IV of the trust agreement contains several pertinent provisions respecting the powers and duties of CS' trustees. Sec-

tion 1 of Article IV gives the trustees the "authority to control and manage the operation and administration of the Trust in accordance with applicable law." Section 2 provides that "[t]he Trustees shall hold, manage, *care for and protect* the Trust Fund ***." (Emphasis added.) Section 9 permits the trustees "to formulate and promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust." Section 9 further provides that "[a]ll rules and regulations adopted by action of the Trustees for the administration of the Trust Fund shall be binding upon all parties hereto [and] all parties dealing with the Trust." Section 14(e) permits the trustees "[t]o do all acts, *whether or not expressly authorized herein,* which the Trustees may deem necessary or proper for the protection of the property held hereunder." (Emphasis added.) Finally, section 17 of the trust agreement provides that "[t]he Trustees, by majority action, shall have the power to construe the provisions of this agreement and the terms and regulations of the Pension Plan; *and any construction adopted by the Trustees in good faith shall be binding upon the Union, Employees and Employers.*" (Emphasis added.)

Further, section 6.02 of CS' pension plan provides that "[a]ll rules and regulations adopted by the Trustees *and all decisions made by the Trustees* shall be binding upon all parties to the Trust Agreement." (Emphasis added.) Finally, section 32.04 of the collective bargaining agreement and paragraph 7 of the participation agreement bind CH and the Union to all rules and regulations adopted by the trustees and all actions taken by the trustees in the administration of the trust.

CS maintains that the above quoted sections obligate it to care for and protect the trust fund and further give it the power to carry out this obligation. It is CS' position that allowing CH to make payments to the fund only on behalf of employees hired prior to May 19, 1982, would seriously threaten the actuarial soundness of the fund. CS notes that it is a "universal

actuarial assumption * * * that the contributions of new members who replace retiring members will be used in part to pay the benefits due retired members * * *. Thus, if no new members enter the group, benefit funds will run out before all the benefits due to retirees based on their life expectancies are paid off." Therefore, in order to protect the fund and fulfill its obligations to the participants and beneficiaries, CS has refused to accept payments tendered by CH.

We agree with the contention of CS that the trust agreement gives it authority to reject payments from participating employers which threaten its actuarial soundness. CH has agreed to be bound by all decisions of the trustees. In an effort to carry out their obligation to protect the trust fund and assure a continuation of benefit payments, the trustees have decided to reject the tendered payments. The trustees' determination that they have the authority to so act is not only supportable by a construction of the governing documents but is entitled to significant weight. *See Central States, Southeast and Southwest Areas Pension Fund,* 53 U.S.L.W. at 4813. As provided in the trust agreement, "any construction [of the trust agreement] adopted by the Trustees in good faith shall be binding upon the Union, Employees and Employer." We have no evidence that the trustees have acted other than in the utmost good faith.

C. Review of Trustees' Actions

Having determined that the trustees had the authority to refuse the payments tendered by CH in order to protect the fund, we must determine whether their actions in doing so were "arbitrary, capricious, or an abuse of discretion." *Tormino,* 712 F.2d at 883. We conclude that the trustees acted reasonably under the circumstances.

CS maintains that permitting the type of action taken by CH would operate to threaten the actuarial soundness of CS. The evidence is uncontradicted that the absence of payments by

employers on behalf of new hirees would expose CS to a substantial unfunded benefit liability. As previously noted, it is a universal actuarial assumption that the contributions of new members who replace retiring members will be used in part to pay the benefits due retired members.

With CH's actions operating to threaten the actuarial soundness of CS, and with the actuarial soundness of CS being "essential to its ability to pay benefits to participants and their beneficiaries," *Talarico v. United Furniture Workers Pension Fund,* 479 F. Supp. 1072, 1081 (D. Neb. 1979), it was reasonable for CS to reject the payments tendered by CH. *See generally Central States, Southeast and Southwest Areas Pension Fund v. Chicago-St. Louis Transport Co.,* 535 F. Supp. 476, 481 (N.D. Ill. 1982), *aff'd* 720 F.2d 681 (7th Cir. 1983). Additionally, we note that CS' rejection of CH's tendered payments is consistent with its policy of rejecting actions that threaten its actuarial soundness, *see* Special Bulletin #20, D.R. at 81, and with its obligation under ERISA to act solely in the interest of and for the exclusive purpose of providing benefits to the participants and beneficiaries, 29 U.S.C. § 1104(a)(1)(A)(i).

As a final note on CH's trust agreement claim, we point out that our holding is in no way meant to imply that CS has the authority to alter, reject, or rewrite the terms of the collective bargaining agreement between CH and the Union. We are holding that CS is given the authority in the governing documents to reject payments by participating employers that operate to threaten the actuarial soundness of the fund. CH has agreed that in the event of an unfavorable judicial determination, it will make retroactive payments with interest and future payments to CS on behalf of both old and new hirees. In turn, CS has agreed not to precipitate a termination of the bargaining unit from the trust fund.

Tortious Interference With Contractual Relations and Antitrust Claims

CH claims that CS, by refusing to accept the payments CH was obligated to tender under its collective bargaining agreement with the Union, tortiously interfered with CH's collective bargaining agreement with the Union. Under applicable Missouri law, the elements of a cause of action for tortious interference with contractual relations include:

> (1) A contract or a business relationship;
>
> (2) Knowledge by the third party of that contract or business relation;
>
> (3) Intentional conduct by the third party inducing or causing the breach of the contract or interruption of the business relation;
>
> (4) Absence of justification for the conduct of the third party; and
>
> (5) Resulting damages.

Teale v. American Manufacturers Mutual Insurance Co., 687 S.W.2d 218, 219 (Mo. Ct. App. 1984) (citing *Francisco v. Kansas City Star Co.*, 629 S.W.2d 524 (Mo. Ct. App. 1981)).

The district court determined that CH failed to sustain its burden of proving the absence of justification for CS' actions. It thus denied CH recovery on its claim for tortious interference. Having previously determined that CS had the authority to reject CH's tendered payments and that its decision to do so was reasonable under the circumstances, we agree that CH has failed to prove an absence of justification for CS' actions.

CH also claims that CS is engaged in an illegal tie-in arrangement in violation of section 1 of the Sherman Antitrust Act, 15

U.S.C. §1, by "attempting to 'tie' together the purchase of pension benefits for present employees with the purchase of pension benefits for future employees." CH further maintains that CS has "acquired and seek[s] to maintain a monopoly on pension contributions from the Fund's contributing employers" in violation of section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. The district court rejected CH's claims for antitrust violations and we, too, find them lacking in merit.

We reverse the district court's decision enjoining CS from refusing to accept payments tendered by CH on behalf of employees hired prior to May 19, 1982. We affirm the district court's decision rejecting CH's claims for tortious interference with contractual relations and violations of the antitrust laws.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-2322C (A)

Central Hardware Company, a corporation,
Plaintiff,

vs.

Central States, Southeast and Southwest Areas Pension Fund, and Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Earl L. Jennings Jr., Howard McDougall, Robert J. Baker, Arthur H. Bunte Jr., and R. V. Pulliam Sr., as Trustees of the Central States, Southeast and Southwest Areas Pension Fund, and George W. Lehr, Executive Director of the Central States, Southeast and Southwest Areas Pension Fund,
Defendants.

MEMORANDUM OPINION

This matter is before the Court on the request of plaintiff, Central Hardware Company, for declaratory and injunctive relief against defendants, Central States, Southeast and Southwest Areas Pension Fund, its trustees and director.

This Court is vested with jurisdiction over the parties and subject matter pursuant to 29 USC 1132(e), 15 USC 15(a), 26, and 28 USC 1331, 1337(a).

The controversy between the parties concerns whether plaintiff and its employees, as a bargaining unit, may choose to retain only the present employees as members of defendant pension trust fund, while placing future employees in a completely different plan. Plaintiff's complaint for declaratory and injunctive relief alleges a breach of contract by defendants in rejecting

the collective bargaining agreement which provided for the "split" unit, tortious interference with the contractual relationship between Central Hardware Company and its employees, and finally, that defendants' actions constitute violations of the Sherman Antitrust Act, Sections 1 and 2.

The case was tried to the Court without a jury on March 26, 1984. The following constitutes this Court's findings of fact and conclusions of law:

Plaintiff, Central Hardware Company, is a corporation incorporated under the laws of the State of Missouri and has its principal place of business in St. Louis County, Missouri. Plaintiff's warehouse employees who are involved in this matter belong to Teamsters Local Union No. 688 (hereinafter referred to as Local 688).

Defendant, the Central States, Southeast and Southwest Areas Pension Fund (hereinafter referred to as the Fund), is a Taft-Hartley trust fund established for the purpose of managing, investing, controlling and disbursing assets under the terms of a Trust Agreement entered into on March 16, 1955, between certain trustees, various employers and local unions of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, on behalf of and to provide benefits to employee participants and their beneficiaries.

The Fund operates in approximately 34 states, services approximately 300 local unions, has approximately 25,000 contributing employers, and has over 460,000 participating employees, both active and retired.

Defendants Robbins, Winstead, Yates, Jennings, McDougall, Baker, Bunte and Pulliam are trustees of the Fund, and defendant Lehr is the executive director of the Fund.

The Central States, Southeast and Southwest Pension Plan (hereinafter referred to as Pension Plan) is a formal document prepared by the Trustees under Article VII of the Trust Agree-

ment. The Plan and the Fund were formed pursuant to and operate subject to the Employee Retirement Income Security Act, the Internal Revenue Code, and other applicable federal law.

Central Hardware Company is an "employer," Local 688 is a "Union," and the Trustees are "Trustees," as set forth in the Trust Agreement.

Plaintiff and Local 688 have entered into collective bargaining agreements since 1959. Prior to May of 1979, these agreements have provided for payment by plaintiff to defendant Fund of contributions for all members of the bargaining unit at a uniform rate after thirty days of employment.

In May of 1979, plaintiff and Local 688 began negotiations for a new collective bargaining agreement to cover the period from May, 1979 through May, 1982. At these negotiations, plaintiff sought to discontinue its contributions to defendant Fund, and transfer the employees to a new company-sponsored plan. Despite the above, plaintiff and Local 688 agreed that plaintiff would continue to make payments to defendant Fund for all of the employees in the bargaining unit during the term of the agreement.

In 1980, plaintiff and Local 688 began new negotiations because of plaintiff's contemplation of moving its warehouse operations out of the St. Louis area. In contemplation of Central Hardware Company's proposed move, and in order to preserve the jobs of its members, Local 688 agreed to enter into a Memorandum of Understanding, dated July 10, 1980, which provided, in part, for a withdrawal of the bargaining unit from defendant Fund, and a transfer of all or part of the unit to the Teamsters Negotiated Occidental Pension Plan.

The Teamsters Negotiated Occidental Pension Plan (hereinafter referred to as the Teamsters Fund) is a pension fund established pursuant to collective bargaining agreements bet-

ween various employers and local teamsters unions on behalf of and to provide benefits to employee participants and their beneficiaries. The Teamsters Fund maintains its principal place of business in St. Louis, Missouri.

The Memorandum of Understanding referred to above predated the Multi-employer Pension Plan Amendments Act of 1980, 29 USC 1322a et seq. (hereinafter referred to as MPPAA). MPPAA provides substantial withdrawal liability upon termination by a pension fund of a bargaining unit's right to participate. Defendant Fund has alleged a withdrawal liability on the part of Central Hardware Company in the amount of $727,828.89 as of March 7, 1984.

In light of the possible withdrawal liabilities it might incur, plaintiff changed its position on its association with defendant Fund, believing that a gradual withdrawal from defendant Fund would not trigger the liability provisions of MPPAA. The new position taken by plaintiff sought to continue all employees hired before May 19, 1982 in defendant Fund, but proposed that all employees hired after May 19, 1982 be in the Teamsters Fund or a company-sponsored plan.

The overall purpose behind the shift to a different pension plan is a lower cost to plaintiff. Plaintiff alleges that a twenty-dollar weekly contribution to the Teamsters Fund would secure for employees the same level of benefits as a weekly contribution of forty-six dollars to defendant Fund. Local 688, however, called for continuation of all warehouse employees in the Central States Pension Plan.

At the negotiations for the 1982-85 collective bargaining agreement, Local 688 conceded on the pension issue and agreed to contributions to the Teamsters Fund on behalf of all newly hired employees. Part of this concession, however, required that another Memorandum of Understanding be executed. This Memorandum, dated June 7, 1982, provided, in Part:

> "* * * if the exclusion from the Central States Pension Plan of persons hired by Central Hardware after May 19, 1982, and covered by this Collective Bargaining Agreement violates the terms and provisions of the Central States Pension Plan in existence and effect on May 19, 1982, then effective for contributions after Central Hardware's receipt of a final determination of such a violation, the Central States Pension Plan shall be substituted for the Teamsters Negotiated Pension Plan in the preceeding."

The "final determination of such a violation" referred to in the preceding quoted paragraph contemplates a judicial determination.

On May 19, 1982, a collective bargaining agreement was entered into for the period covering May 19, 1982 to May 31, 1985. This new agreement provided for the split in the bargaining unit for pension plan purposes.

On May 19, 1982, seventy-eight of plaintiff's warehouse employees were members of Local 688, and since May 19, 1982, approximately seventeen new full-time warehouse employees have been hired by plaintiff, all of whom are members of Local 688.

On October 25, 1982, defendant Trustees informed plaintiff that the proposed 1982-85 collective bargaining agreement was not acceptable, and that if the collective bargaining agreement were not amended, the participation of the bargaining unit in defendant Fund would be terminated. It is this action by the Trustees of which plaintiff complains.

The basis for defendants' rejection of the 1982-85 collective bargaining agreement is found in the language of the Trust Agreement, the Pension Plan and in a Special Bulletin promulgated by the Trustees.

The recital of the 1979 Trust Agreement states:

> "* * * the Trustees declare that they will receive and hold the contributions and any other money or property which may come into their hands as Trustees, * * * with the powers and duties, uses, and purposes as hereinafter set forth * * *."

Article I, Section 1 of the Trust Agreement defines an employer as "any employer who is bound by a collective bargaining agreement with the Union, * * * who satisfies the requirements for participation as established by the Trustees and agrees to be bound by this Agreement."

Article IV, Section 1 provides that "[t]he Trustees shall have authority to control and manage the operation and administration of the Trust in accordance with applicable law."

Under Article IV, Section 9, the Trustees are "* * * authorized to formulate and promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust."

Section 9 also provides that "[a]ll rules and regulations adopted by action of the Trustees for the administration of the Trust Fund shall be binding upon all parties hereto, all parties dealing with the Trust, and all persons claiming any benefits hereunder."

Article IV, Section 14(e) authorizes the Trustees "to do all acts, whether or not expressly authorized herein which the Trustees may deem necessary or proper for the protection of the property held hereunder."

In October of 1977, the Trustees passed Special Bulletin Number 20. No copies were sent to any contributing employers, nor to the plaintiff. Special Bulletin Number 20 reads as follows:

"TO: ALL LOCAL UNIONS WITH MEMBERS PARTICIPATING IN THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND.

"The Full Board of Trustees at their August 17, 1977 meeting adopted the following resolution in order to prohibit acceptance of collective bargaining agreements considered detrimental to the actuarial soundness of the Pension Fund:

"WHEREAS, the Board of Trustees (the 'Trustees') of Central States, Southeast and Southwest Areas Pension Fund (the 'Fund') have determined that there exists a need to establish a uniform policy for payment of employer pension contributions; and

"WHEREAS, the Trustees of the Fund have determined that this policy is required in order to preserve and protect the interests of the participants and beneficiaries of Central States, Southeast and Southwest Areas Pension Plan (the 'Pension Plan'):

"NOW, THEREFORE, BE IT RESOLVED by the Trustees of the Fund, in meeting assembled, that effective immediately staff shall be authorized and directed to refuse to accept any collective bargaining agreement or renewal thereof if the terms and conditions thereof provide that the employer may differentiate the amount of pension contributions among employees working under that collective bargaining agreement or a supplement thereto, notwithstanding their classification or employment, by using any of the following points of difference as the measure for different contribution rates:

"a) the age of such employees;

"b) the length of service or seniority of such employees;

"c) the employment commencement date of such employees;

"d) the amount of 'Credited Service' (as defined in the Pension Plan) of such employees; or

"e) the likelihood of such employees to meet any of the prerequisites for any benefits defined in the Pension Plan."

Defendants maintain that the Trustees have established a policy which requires a uniform rate for all employees in the Central Hardware bargaining unit and, therefore, all contributions on behalf of all employees must be at the same rate. Defendant contends that the terms of the 1982-85 bargaining agreement would result in contributions for employees hired before May 19, 1982 totalling forty-one dollars per employee, while employees hired after that date would contribute nothing. In the second and third years of the agreement, plaintiff will have contributed forty-six dollars and fifty-one dollars per week, respectively, for employees hired before May 19, 1982, while the newer employees will have had nothing contributed for them.

Defendants further assert that the proposed shift of employees hired after a certain date to a different fund would violate the actuarial soundness of the plan and, therefore, the Trustees possess the authority, under Special Bulletin Number 20, to reject the proposed 1982-85 collective bargaining agreement. Defendants put forward evidence at trial on the detrimental effect that the proposed agreement would have on the Fund, and thus urge the Court to uphold their rejection of the agreement.

Plaintiff's complaint is for damages based on three separate alleged causes of action: Breach of contract, tortious interference of a contractual relationship, and violations of the Sherman Antitrust Act, Sections 1 and 2. The Court will now address these alleged causes of action in that order.

Plaintiff's breach of contract claim alleges a contractual duty on the part of the defendant Trustees to accept its contributions under the Pension Plan, the Trust Agreement and the 1982-85 collective bargaining agreement.

Article III, Section 1 of the Trust Agreement requires plaintiff to "make continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement between the parties."

Article III, Section 3 of the same agreement provides:

> "The Trustees are hereby designated as the persons to receive the payments heretofore or hereafter made by the employers to the Trust Fund * * *. The Trustees agree to receive all such payments, * * * and to hold same in Trust hereunder for the uses and purposes of the Trust herein created."

Plaintiff maintains that nowhere in the Trust Agreement is discretion given to Trustees whether or not to accept contributions or to accept or reject a collective bargaining agreement. Irrespective of the propriety of this assertion, plaintiff's claim for breach of contract depends on applicable language found in the Pension Plan document.

Section 7.01 of the Plan requires that "[e]ach employer shall make continuing and prompt payments to the Trust Fund on behalf of each Employee in its Bargaining Unit as required by the applicable Collective Bargaining Agreement."

Section 1.06 defines an "employee" as "a person * * * who is employed under the terms and conditions of a Collective Bargaining Agreement * * * entered into between an Employer * * * and a Union * * * and on whose behalf contributions are made or are presently required to be made to the Pension Fund by the Employer."

Under the 1982-85 collective bargaining agreement between plaintiff and Local 688, only employees hired before May 19,

1982 fall within the definition of "employee." Employees hired after May 19, 1982 are not deemed employees under the Plan because no contributions are made or are "required" to be made on their behalf. The question remains, however, whether the Trustees have the authority to require participation of "non-employees" in the Plan.

The Trustees are vested with authority to "promulgate any and all necessary rules and regulations which they deem necessary or desireable to facilitate the proper administration of the Trust." Special Bulletin Number 20, set out above, was issued under this authority.

This Court cannot accept defendants' interpretation of Special Bulletin Number 20 as applied to the collective bargaining agreement proposed by plaintiff and Local 688. It is clear that the special bulletin was formulated to prevent a situation in which a collective bargaining agreement sets out a "split-rate" scheme whereby employees would make the maximum contribution level only for a long enough period of time to vest the employee at the maximum benefit level, and would then make smaller contributions for the balance of the term of employment. The language of the Special Bulletin, the examples set out therein, and testimony at trial, discloses that only the "split-rate" situation was intended to be prohibited by the Special Bulletin.

The distinguishing feature between the situation contemplated by the Special Bulletin and the facts *sub judice* is that none of the employees hired after May 19, 1982, are now, or likely ever will be, beneficiaries of or participants in the Central States Pension Plan. The Special Bulletin simply declines to administer contributions from an employer committed to a "split-rate" arrangement and is, therefore, inapplicable to the present controversy because a split-rate arrangement has not been proposed. No express authority to require participation of "non-employees" is present in the language of the Trust Agreement

or Pension Plan, nor is there any cognizable reason to imply such broad powers.

The Trust Agreement requires the Trustees to accept contributions established by the collective bargaining agreement. Having no basis to reject plaintiff's payments to the Fund, defendant Trustees have exceeded their authority and breached the contractual duty placed upon them in the Pension Plan and the Trust Agreement.

Plaintiff's second count of its amended complaint states a cause of action for tortious interference with the contractual relationship between plaintiff and Local 688. Missouri law, which applies, requires a plaintiff to establish five elements in order to sustain this tort claim. These elements are: 1) A contract or a valid business relationship or expectancy; 2) Defendant's knowledge of the contract or relationship; 3) Intentional interference by the defendant inducing or causing a breach of the contract or relationship; 4) The absence of justification; and 5) Damages resulting from defendant's conduct. *Salomon v. Crown Life Ins. Co.*, 536 F. 2d 1233, 1238 (8th Cir. 1976), cert. denied, 429 U. S. 961 (1976); *C & M Developers, Inc. v. Berbiglia,* 585 S. W. 2d 176, 183 (Mo. App. 1979).

Plaintiff has failed to sustain its burden on this claim. Assuming that a breach of contract occurred between plaintiff and Local 688, it is the opinion of this Court that defendant Trustees had sufficient justification in its rejection of the contributions and collective bargaining agreement to avoid liability in tort. The Restatement (Second) of Torts, Section 773, addresses the justification defense:

> "One, who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the ac-

tor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction."

Defendant Trustees point to their fiduciary duty in administering the trust and its authority under the Trust Agreement and Pension Plan to formulate rules so as to provide for an actuarially sound pension plan. In creating the Special Bulletin, the Trustees viewed a "split-rate" plan as detrimental to the actuarial soundness of the plan. If a collective bargaining agreement is deemed by the Trustees to violate the Special Bulletin, their only recourse is to decline to administer contributions from an employer committed to an arrangement which they view as violating that rule. See *Central States, Southeast and Southwest Areas Pension Fund v. Chicago-St. Louis Transport Co.*, 535 F. Supp. 476, 480-81 (N. D. Ill. 1982). Defendant Trustees declined to administer contributions in order to protect the interest they hold in maintaining an actuarially sound plan. If they had not declined to do so, from their point of view, this interest in administering such plan would have been destroyed.

Plaintiff's third cause of action alleges an attempt to monopolize, and monopolization of, trade or commerce in violation of Section 2 of the Sherman Antitrust Act. 15 USC 2. At trial, plaintiff introduced evidence and raised issues which constituted allegations of a "tying arrangement," or per se violation of Section 1 of the Sherman Antitrust Act. 15 USC 1. Plaintiff, in a post-trial brief, moved to amend its pleadings to conform to the evidence pursuant to Rule 15(b), Federal Rules of Civil Procedure.

This Court is of the opinion that the weight of the credible evidence supports a conclusion denying relief on any of these antitrust claims.

In order to sustain its burden that defendant Trustees have attempted to monopolize "any part of the trade or commerce

among the several states" under 15 USC 2, plaintiff is required to show defendants' specific intent to monopolize, and also a dangerous probability of success within a relevant product and geographic market. *United States v. Empire Gas Corp.*, 537 F. 2d 296 (8th Cir. 1976).

Section 2 of the Sherman Antitrust Act provides two elements for a showing of an existence of a monopoly. These are, one, the possession of monopoly power in the relevant market, and, two, the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71; 86 S. Ct. 1698, 1703-4 (1966).

Plaintiff has not sustained its burden as to the intent element in these causes of action. As explained above, it is this Court's view that defendant Trustees were acting, although eventually determined to be beyond their authority, to protect their interest (and duty) in maintaining an actuarially sound pension plan. Taking the Trustees' actions beyond that context, and to the extent that plaintiff alleges, could have an extremely adverse and unjustified effect on the lawful performance of their duties. Also, plaintiff has disclosed no case law containing even a remotely analogous situation to that at bar.

Plaintiff's last antitrust allegation, not pled in its complaint, is for a violation of Section 1 of the Sherman Antitrust Act in defendant Trustee's attempt to "tie" together the purchase of pension benefits for present employees with the purchase of benefits for future employees.

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere. *Jefferson Parish Hospital District No. 2 v.*

Hyde, 104 S. Ct. 1551, 1558 (1984). The rule of "per se" unreasonable tying arrangements was first announced in *International Salt Co. v. United States,* 332 U. S. 392, 68 S. Ct. 12 (1947), where the Supreme Court stated that tying arrangements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." Id. at 396, 68 S. Ct. at 15. Of course, a court must first inquire as to whether two separate products or services are involved in the alleged tying arrangement.

Plaintiff contends that two separate products are involved in this matter, pension benefits purchased for present employees, and pension benefits purchased for future employees. The question of whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items. *Jefferson Parish Hospital District No. 2 v. Hyde,* supra, at 1562.

The Pension Plan's purpose is to provide benefits for plan participants and their beneficiaries. Distinguishing between present and future employees in attempting to establish two distinct products for the purpose of alleging a "tying" arrangement is to no avail. "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market." *Times-Picayune Publishing Co. v. United States,* 345 U. S. 594, 614; 73 S. Ct. 872, 883 (1953). A "tying" arrangement is not present because the arrangement proposed here does not link two distinct markets for products that are distinguishable in the eyes of consumers. *Jefferson Parish Hospital District No. 2 v. Hyde,* supra at 1562. Plaintiff has failed to sustain its burden in proving a "tying" arrangement that constitutes an unlawful restraint of trade.

Accordingly, the Court finds that the defendant Trustees' rejection of Central Hardware Company's collective bargaining agreement of May 19, 1982, constitutes a breach of the Trustees' contractual obligations to plaintiff under the Trust Agreement, and it is ordered that the Trustees are enjoined from refusing or otherwise failing to accept payments from Central Hardware on behalf of the employees hired before May 19, 1982, as called for in the 1982-85 Collective Bargaining Agreement.

/s/ Roy W. Harper
U. S. District Judge